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No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),
Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,
Defendant in Error.
(Plaintiff below).

BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

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Statement of the Case.

This is an action brought by the defendant in error to recover the alleged value of a certain shipment of goods which defendant in error claims to have delivered to plaintiff in error for transportation from Antwerp, in the Kingdom of Belgium, to San Francisco, California. The goods were destroyed by fire while they were stored in the Gov-

ernment warehouse at Antwerp, in the exclusive custody of the customs authorities of the Kingdom of Belgium under the circumstances described in the Agreed Statement of Facts, hereinafter set forth.

The contention of defendant in error (plaintiff below) is that the goods involved before the time of their destruction had been delivered and accepted by plaintiff in error as carrier for immediate transportation; that the fact that the goods were destroyed while in the Government warehouse in the exclusive custody of the Belgium customs officials does not in any way limit, or vary, or change the responsibility of the plaintiff in error, and that it is liable for the goods as an insurer thereof.

On the other hand, the contention of the plaintiff in error (defendant below) is that the goods were never, before their destruction, in the possession, custody and control of the plaintiff in error; that, on the contrary, being in the exclusive custody of the Belgian customs officials in the warehouse of the Government of the Kingdom of Belgium, the goods were in *custodia legis,* and being there destroyed without any fault on the part of plaintiff in error, it is relieved from liability for their loss, as an insurer.

The Facts.

There is no dispute as to the facts; our contention arises over what we conceive to be a misap-

prehension on the part of the trial court as to the legal consequences flowing from them.

The agreed statement of facts is as follows:

> "Plaintiff, at the time when the Complaint in this action was filed, and at all times in said complaint mentioned, was, and now is, a citizen and resident of the United States and of the State of California, and doing business in San Francisco, in said Northern District of California, as importer, under the firm name of 'Wieland Bros.' Defendant, at all of said times, was, and now is, a foreign corporation, to wit: a corporation of the Dominion of Canada, having a place of business in said San Francisco, and was, and is, a common carrier of goods for hire. At all of the times herein specified defendant maintained an agency in the City of Antwerp, in the Kingdom of Belgium, in sole charge of one Herbert H. Debenham, who, for seven years next preceding the events hereinafter mentioned, had been, and then was, the European Continental Traffic Agent of the Canadian Pacific Railway Company. It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, to the extent that such shipments could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in this action) coming there in bond for export pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as were necessary to have such shipments of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at

Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty. The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, and not otherwise, said Debenham, on behalf of defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp to San Francisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements [13] which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied. In the regular course of business, and pursuant to the terms of the arrangements aforesaid, shipments had been from time to time received

by said Debenham for plaintiff, as hereinabove set forth, forwarded to San Francisco, and delivered to plaintiff during five years preceding the shipment here in question.

On May 11, 1901, Oswald Roth, of Uster, Switzerland, shippers of the goods mentioned in the complaint, intending to send the same, via Antwerp, to plaintiff, at San Francisco, by way of defendant's road, from Montreal wrote to Debenham, as follows:

'Messrs. Wieland Bros. at San Francisco have advised me that, in future, I must send my consignments by the last boat leaving Antwerp each month. Please let me know at once when the last sailing will take place this month.' (Exhibit 17.)

On May 13, 1901, Debenham answered as follows:

'Referring to yours of the 11th inst. I request you to send me the lot of cheese for account of Wieland Bros. of San Francisco to "Antwerp Bassins Transit" Station, so that it will arrive on the 22nd inst.' (Exhibit 18.)

On May 14, 1901, Oswald Roth answered:

'Yours of the 13th inst. just received, but I cannot get the shipment of 35 tubs ready tomorrow, and as Thursday is a holiday, I cannot send it in time for the sailing on the 22nd. Kindly let me know the date of sailing of the very next steamer following. * * * I counted on a sailing on about May 25 or 30.' (Exhibit 19.)

On May 17, 1901, Debenham replied:

'Yours of the 14th inst. received and contents noted. Please prepare the cheese so that it may arrive here towards the end of the month; for very probably there will be a sailing for Montreal by the end of the month or on one of the first days of June. 'I shall have definite

news to-morrow or day after, and meanwhile await my advices before shipping.'

On May 20, 1901, Debenham wrote to Oswald Roth:

'Confirming mine of the 17th inst. I take pleasure in advising you that the Steamer "Sadinian Prince" will sail on June 5, and I request you therefore to forward to me the lot of cheese to "Antwerp South Transit" Station to arrive not later than June 3.' (Exhibit 21.)

On May 24, 1901, Debenham wrote to Oswald Roth again:

'Please let me know by return mail if you will act on my letter of the 30th inst.'

At all the times specified in this statement of facts, there was in operation, and known to all the parties hereto, an International Treaty, entered into and binding upon various nations of Europe, including Switzerland, France, Germany and Belgium, pursuant to the provisions of which treaty shipments of merchandise intended for export beyond the territory of any of said nations could be transported through the territory of such nation 'In Bond', that is to say, shipments of such merchandise could, pursuant and subject to the provisions of said treaty, be transported into and beyond the territory of such nations without payment of any duty, provided that each of the said shipments of merchandise were contained in receptacles that remained sealed, unbroken and in the uninterrupted, exclusive and official custody of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom. But persons standing in a relationship to such shipments of merchandise, such as Debenham occupied to the shipment in controversy, had the

right to direct such Governmental customs authorities when and where such shipments should be delivered for deportation.

On May 25, 1901, the shipment of merchandise (consisting of 35 tubs of cheese) which is involved in this action, and which was a shipment of merchandise intended to be forwarded, pursuant and subject to the provisions of the arrangements aforesaid and of the International Treaty herein specified, through territory belonging to the Republic of Switzerland, The Republic of France, The German Empire, and the Kingdom of Belgium, in Bond for export, from the port of Antwerp, to San Francisco, America, there to be delivered to plaintiff, was placed on board a local railroad train at Uster, Switzerland, consigned to the firm of Niebergall & Goth, forwarders, in Bale, Switzerland, the way-bill indicating that the shipment was sent in Bond in transit to the United States by way of Bale and Antwerp. The car containing the shipment arrived in Bale on May 28th, and the original car containing the shipment was forwarded by Niebergall & Goth on the same day by way of the Alsace-Loraine Imperial Railway, and the Belgian State Railway, to H. Debenham, Anver-Bassins Station, Antwerp, said Debenham being, pursuant to the arrangements aforesaid, designated as the consignee of the shipment in the accompanying way-bill, covering transit from Bale to Antwerp.

The Alsace-Loraine Imperial Railway took the car containing the goods as far as Sterpenich, a station on the Belgian frontier, where it was received by the Belgian State Railway, about 5 p. m., May 29, 1901, and from there carried by the latter railway to Anvers-Bassin Station, at Antwerp, where it arrived May 30th, 1901. The Belgian State Railway was operated by the Government of the Kingdom of Belgium, and the same officials of the Government

who operated the railroad, were also customs officers of the Government acting as such with respect to the freight which was transported by the said railroad, pursuant and subject to the provisions of the Treaty aforesaid. Upon the arrival of the car at Anvers-Bassin Station at Antwerp, as aforesaid, the station authorities notified Mr. Debenham of its arrival, and delivered to him the way-bill accompanying the shipment. According to the provisions of the Treaty aforesaid, and of the Laws of the Kingdom of Belgium, Mr. Debenham then had the option of directing the railroad customs officials to take the goods to the Belgium Governmental Customs Warehouse, called the Entrepot Royal, there to remain until such time as he should direct them to be taken to the ship which was to receive them, or of directing said officials to take the car containing the goods to the wharf at which the ship was to receive them, there to remain until such time as he should direct the goods to be placed on board such ship. In either case, the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive official custody of the Government Customs authorities until actually loaded on board the ship.

As the ship on which the goods aforesaid were to be embarked for transportation out of the Kingdom of Belgium was not at the time of the arrival of said goods at Antwerp ready to receive the shipment, Mr. Debenham directed the railroad customs officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the Entrepot Royal, there to be held in the custody of the Belgian customs authorities until he notified the customs authorities that the vessel which was to receive the shipment was ready to receive

and embark the shipment for export from Belgium, whereupon it would have been the duty of the Belgian customs authorities to transport the shipment from the Entrepot Royal, said Governmental customs warehouse, to the wharf and there deliver it physically to the ship which was to receive it and to make certain that the shipment was actually embarked on the vessel and carried out of the Kingdom of Belgium. Under the provisions of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, a shipment of merchandise like the one aforesaid, passing through Belgian territory in bond in transit merely, was required to remain uninterruptedly in the exclusive, official custody, possession and control of the Customs authorities of the Kingdom of Belgium (subject to the direction of persons standing in a relationship to such shipments such as Debenham occupied to the shipment in controversy, as to when and where such shipments should be delivered for deportation, as aforesaid), until the shipment was actually, physically delivered by such customs authorities, at the instance of the consignee of the shipment, on board the vessel which was to transport it beyond the Kingdom, unless the consignee of such shipment paid to the Belgian Government the charge and duties due on the shipment, and accepted actual physical delivery and possession thereof.

In pursuance of the directions of Mr. Debenham aforesaid, the car which contained the goods involved in the controversy in this action, shortly after its arrival at Antwerp, was taken by the Customs authorities from the Anvers-Bassin Station to the Entrepot Royal, where, on June 1, 1901, the goods were unloaded from the car and stored in the warehouse, under the exclusive custody and control of the Belgian Customs authorities. Upon receipt of the goods in the warehouse, the Customs authorities

delivered to Debenham a document called 'Acquit de Transit', which Debenham was to keep until the moment when the goods were to be removed from the warehouse to the steamer, and to deliver up to the customs authorities whenever, on his directions, the goods were to be embarked on board of the deporting vessel.

Whenever the goods were to be thus removed, the law required that Debenham should present this document called 'Acquit de Transit' to the Customs authorities, whereupon the latter authorities would issue a 'remise au depart' (release for departure) and send the goods to the deporting steamer, officers of the Customs remaining in custody thereof until the goods were actually and eventually loaded on board, and thereby passed out of the Kingdom. The warehouse charges were paid by Debenham. The transportation charges from the warehouse to the steamer would have been payable by Debenham, and would have been by him chargeable and collectible from Oswald Roth, the shipper aforesaid.

Mr. Debenham did secure a 'remise au depart' for the goods involved in this action before they were destroyed in the Bonded Warehouse.

Mr. Debenham, as agent of the Canadian Pacific Railway Company, advertised in the 'Lloyd Anversois', an Antwerp daily paper, on May 22, 1901, that the steamer 'Sardinian Prince' would be able to load for Montreal direct, and would sail on June 5, 1901.

The steamer 'Sardinian Prince' entered the port of Antwerp at noon, on Saturday, June 1, 1901, in ballast, was berthed at Quai Ledeganck, and began to load her cargo on Monday, June 3d, finished loading on June 7th, during the night, and left the port on June 8th.

On June 5th, 1901, at 2:36 p. m., a fire broke out in the Royal Warehouse, called the Entre-

pot Royal, as aforesaid, which destroyed the building and contents, including the 35 tubs of cheese here in suit. The fire which destroyed said cheese as aforesaid was not due to any fault or negligence of defendant.

The market value of the cheese at the time and place of its destruction, viz.: on June 5th, 1901, at Antwerp, Belgium, was the sum of 16,569.40 francs, and the value of such cheese at San Francisco, California, on the 1st day of August, 1901, the time when in due course it would have arrived there had it been shipped on the 'Sardinian Prince', was the sum of $6200.00."

(Transcript, pp. 12 to 22.)

Specification of the Errors Assigned and Relied Upon by Plaintiff in Error.

Upon the facts as set forth in the foregoing agreed statement, the plaintiff in error assigns and relies upon the following specifications of error:

1. The court erred in deducing and determining from the agreed statement of facts that the goods which are involved in the controversy in this action had been completely delivered to the plaintiff in error as a common carrier at the time when they were destroyed by fire in the Royal warehouse of the Kingdom of Belgium at Antwerp.

2. The court erred in failing to decide that the said goods at the time of their destruction by fire in the Royal Government warehouse of the Kingdom of Belgium under the exclusive, actual, physical and official custody and control of the Governmental

Customs Officers of said Kingdom, were in *custodia legis* and not in the possession of plaintiff in error.

3. The court erred in holding that although the goods were stored in the Royal Government warehouse of the Kingdom of Belgium, under the circumstances specified in said agreed statement of facts, the plaintiff in error became an insurer of their safety, and liable to the demand of the defendant in error for the value of the goods, notwithstanding the fact that the fire which destroyed the goods was not due to any fault or negligence of the plaintiff in error.

4. The court erred in giving and entering judgment for the said defendant in error, and against said plaintiff in error.

5. The court erred in fixing the amount of the value of the said goods as of the date of the delivery at San Francisco, and not as of the date of their destruction at the Port of Antwerp.

Argument.

I.

THE GOODS INVOLVED IN THIS CASE HAD NOT BEEN, BEFORE THE TIME OF THEIR DESTRUCTION, DELIVERED TO AND ACCEPTED BY THE PLAINTIFF IN ERROR AS A CARRIER FOR IMMEDIATE TRANSPORTATION.

The ordinary rule relative to the general liability of carriers for freight which they have undertaken

to carry is stated by various text writers to be as follows:

> "It will therefore be found that while private carriers, whether with or without reward, are strictly bailees and nothing more; and that questions as to their liability are to be determined by the ordinary rules which govern the responsibility of bailees, the common carrier of goods stands upon an entirely different footing, and when questions as to his liability for the loss of the goods or their injury whilst in his custody for the purpose of carriage arise, they must be decided upon principles peculiarly applicable to them, and which have no application to any other kind of bailment except that to the inkeeper by his guest. In all other cases of bailment, for instance, the very foundation of the bailee's liability is negligence in some degree, either greater or less, according to the particular nature of the bailment, and before he can be made liable the requisite negligence must be shown. But the question of negligence, when the purely common-law relation of common carrier to the goods exists, is ordinarily wholly foreign to the inquiry whether such a carrier is to be held liable for their loss or injury, and, as will hereafter be seen, evidence on his part of the most exact diligence will be wholly irrelevant and inadmissible. If, for example, the private carrier or any other ordinary bailee be robbed of the goods, or if they should be accidentally destroyed by fire or any other calamity, without negligence on his part, the law will excuse him; but if they be taken from a common carrier by force ever so irresistible less than the public enemy, or if they should be destroyed by fire ever so unavoidable, he will nevertheless be liable for them. He is an insurer of the goods against all losses except those caused by the act of God,

the public enemy, *the law,* the owner, or the inherent nature of the goods. His extraordinary liability rests upon a rule of law, applicable to but two classes, which had its rise in reasons of public policy, and not upon the contract of bailment, although without the bailment the liability cannot exist."

Hutchinson on Carriers, Sec. 4.

"The common law liability of the common carrier of goods, in the absence of special contract or proven custom limiting such liability, is that of an insurer against loss or injury of the property, while in its custody or under its control as a common carrier, etc."

Moore on Carriers, Sec. 2 (2nd Ed.), p. 26.

See also:

Angel on Carriers, Sec. 148, et seq.;

Kent's Commentaries Star, pp. 597, 598.

But the rule above stated does not take effect until and unless the goods were delivered to and accepted by the carrier.

Before this extraordinary liability can be charged upon a carrier, it must appear that the goods were delivered to and accepted for transportation by the carrier.

Hutchinson on Carriers (3rd Ed.), Sec. 104, p. 101.

"The delivery must be complete. The duties and obligations of the common carrier with respect to the goods commence with their delivery to him; and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and

the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. They must be delivered to the carrier himself, or to some agent of his, authorized to receive them on his behalf."

Hutchinson on Carriers (3rd Ed.), Sec. 105, p. 102.

"The responsibility of a common carrier therefore is fixed by the acceptance of the goods, whether the acceptance be in a special manner or according to the usage of his business. But an acceptance in some way is indispensable, for if it appears that there is no intention to *trust the carrier with the custody of the goods* he will not be liable."

Angel on Carriers, Sec. 140.

"To complete the delivery of the property within the rules laid down in the authorities, *it is essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business of the carrier and under his immediate control. It must be accepted and received by the agent.* There must be an actual delivery of the goods to the carrier or a constructive delivery, with notice to it of an intention thereby to place them in its care and custody * * * The property must have been delivered into the *exclusive control of the carrier and accepted by the latter in that capacity for transportation.*" (Italics ours.)

Moore on Carriers (2nd Ed.), Sec. 3, p. 174.

When the delivery becomes complete:

"The entire responsibility for the safety of the goods being shifted from the owner to the

common carrier as soon as the delivery is made, it frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time such delivery becomes complete; for, as we have seen, *until the entire exclusive custody of them has been given to the carrier, no responsibility rests upon him in that character.* The most that can be said generally upon this subject is, that a tender of the goods being made to the carrier, his liability for their safety as carrier arises *eo instanti* with his acceptance of them. The difficulty lies in applying the law in such cases and not in its statement; that is, in determining in the particular instance exactly at what time the circumstances show the acceptance to have taken place. To effect a delivery to the carrier there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and until this has been done it cannot be said that the carrier has assumed any responsibility for them as carrier." (Italics are ours.)

Hutchinson on Carriers, (3rd Ed.) Sec. 119, p. 116, and cases cited.

See Union Trust Co. v. Wilson, 198 U. S. 537.

"We think the rule well established that when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. (Kansas City Co. v. Barnett, 61 S. W. (Ark.) 919.) But we believe it equally well settled that such liability does not attach

until the goods are unconditionally surrendered by the shipper and accepted by the carrier."

Chicago &c. v. Powers, (Nebraska) 103 Northwestern 679.

"Defendant is not liable, or plaintiff entitled to recover, unless it had possession or control of the goods at the time of their destruction."

H. L. Edwards D. Co. v. Texas-Midland Co., 81 Southwestern Rep., p. 801, and cases cited in opinion.

It thus appears that the extraordinary liability (responsibility) of the common carrier as an insurer is charged upon him because of the fact that goods when once delivered to and accepted by him are completely and unconditionally surrendered into his possession and control.

Defendant in error appears to concede that the rule is as above stated, and seeks to bring this case within the application of the rule by contending that the liability of the common carrier commences whenever and as soon as the goods have been delivered to and accepted by him solely for transportation although they may not be put immediately *in itinere.*

Many cases no doubt arise in which such a contention would be proper. But it is to be noted that it is applied only to cases where the carrier has *unconditionally* accepted the goods for immediate transportation and has received them in *his own*

warehouse or *place of keeping,* and for his own convenience as a mere accessory to the carriage.

The liability does not attach until the goods to be shipped are *unconditionally* delivered by the shipper and accepted by the carrier.

> Chicago, etc. v. Powers, 73 Neb. 816; 103 N. W. 678.

The relation of shipper and carrier does not begin between the owner of goods and the carrier, though the former may have delivered the goods to the latter, if, after such delivery, anything required either by law or the contract remains to be done by the shipper. The responsibility does not commence until the delivery has been completed. The goods must have been delivered into the exclusive control of the carrier and accepted by the latter in that character for transportation.

> Moore on Carriers, (2nd Ed.) Vol. I, pp. 171, 172 and cases cited.

In a case which in many respects was analogous to the case at bar, the U. S. Supreme Court said:

> "Cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a

> cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation."
>
> St. Louis &c. Railway v. Commercial Ins. Co., 139 U. S. 223, 237.

In this case the goods were not and could not have been delivered to or accepted by the carrier so as to charge it with liability as an insurer.

In the case at bar, the carrier which transported the goods into Belgium was bound, by virtue of the character of the shipment, under the law, to deliver them into the custody of the Governmental authorities, not for the convenience of defendant, the carrier, or as an accessory to his carriage, but for the purpose of impounding the goods in the exclusive keeping of the Government for the protection of the Government. Such a delivery was necessarily subject to the regulations of the law and of the Revenue Department of the Government (C. and N. W. R. R. Co. v. Sawyer, 69 Illinois 292), and the goods involved, at the time of their destruction, had been duly delivered to and were in the possession and custody and control of the duly constituted Customs authorities of the Kingdom of Belgium.

II.

THE GOODS BEING, AT THE TIME OF THEIR DESTRUCTION, IN THE ROYAL GOVERNMENT WAREHOUSE OF THE KINGDOM OF BELGIUM, IN THE EXCLUSIVE, ACTUAL, PHYSICAL AND OFFICIAL CUSTODY AND CONTROL OF THE BELGIAN CUSTOMS OFFICIALS, WERE IN CUSTODIA LEGIS, AND NOT IN THE POSSESSION OF THE PLAINTIFF IN ERROR.

There can be no doubt, we think, that goods in the possession of Customs authorities are in the custody of the Government. The place in which the goods are thus kept is not the essential fact, *but the custody of the Government, and the consequent exclusion of control over them by the owner,* which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when *he is at liberty to take possession of them.* Ordinarily, *goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody.*

Hartranft v. Oliver, 125 U. S. 525, 527.

Omitting reference at this time to the Agreed Statement of Facts, we contend that, as a matter of law, plaintiff, who shipped goods *in bond,* as shown, must be presumed to have known that the goods so shipped were to remain in the custody and control of Government officials, and could

not be delivered to defendant until they were actually embarked aboard ship for exportation.

> "The parties to the contract of carriage must be presumed to have contracted with the common knowledge of the necessity for customs detention and inspection, and the burden is on the shipper to make provision for the passage of his property beyond the borders of the foreign territory, if non-dutiable. *The carrier is wholly powerless to prevent its seizure and detention and he cannot be held liable for its destruction, either in transit or at the place of destination, while in the possession of customs house officials, by a fire which he did not occasion, and which he could not, by any possible act of diligence, have prevented.*"
>
> Hutchinson on Carriers, (3rd Ed.) Vol. 2, Sec. 755, p. 837, and cases cited.

This is conclusively evidenced by the Agreed Statement of Facts, which shows that:

> "At all of the times herein specified defendant maintained an agency in the City of Antwerp, in the Kingdom of Belgium, in sole charge of one Herbert H. Debenham, who, for seven years next preceding the events hereinafter mentioned, had been, and then was, the European Continental Traffic Agent of the Canadian Pacific Railway Company. It was the duty of said H. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, *to the extent that such shipments could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified,* and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in

this action) coming there in bond for export, pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as were necessary to have such shipments of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty.

The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with the defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, and not otherwise, said Debenham, on behalf of the defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp, to San Fran-

cisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied.

There was in operation, and known to all the parties hereto, an International Treaty, entered into and binding upon various nations of Europe, including Switzerland, France, Germany and Belgium, pursuant to the provisions of which treaty shipments of merchandise intended for export beyond the territory of any of said nations could be transported through the territory of such nation *'In Bond'* that is to say, shipments of merchandise could, pursuant and subject to the provisions of said treaty, be transported into and beyond the territory of such nations without payment of any duty, provided that each of said shipments of merchandise were contained in receptacles that remained sealed, unbroken and in the uninterrupted, exclusive and official custody of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom. But persons standing in a relationship to such shipments of merchandise, such as Debenham occupies to the shipment in controversy, had the right to direct such Governmental Customs authorities when and where such shipments should be delivered for deportation.

On May 25th, 1901, the shipment of merchandise (consisting of 35 tubs of cheese), which is involved in this action, and which was a shipment of merchandise intended to be forwarded, *pursuant and subject to the provisions of the*

arrangements aforesaid and of the International Treaty herein specified, through territory belonging to the Republic of Switzerland, The Republic of France, The German Empire, *and the Kingdom of Belgium, In Bond for Export, from the port of Antwerp, to San Francisco, America,* there to be delivered to plaintiff was placed on board a local railroad train at Uster, Switzerland, consigned to the firm of Niebergall & Goth, forwarders, in Bale, Switzerland, the way-bill indicating that the shipment was sent in bond in transit to the United States by way of Bale and Antwerp. The car containing the shipment arrived in Bale on May 28th, and the original car containing the shipment was forwarded by Niebergall & Goth on the same day by way of the Alsace-Loraine Imperial Railway, and the Belgian State Railway to H. Debenham, Anvers-Bassins Station, Antwerp, said Debenham being, pursuant to the arrangements aforesaid, designated as the consignee of the shipment in the accompanying way-bill, covering transit from Bale to Antwerp.

The Alsace-Loraine Imperial Railway took the car containing the goods as far as Sterpenich, a station on the Belgian frontier, where it was received by the Belgian State Railway, about 5 P. M., May 29, 1901, and from there carried by the latter railway to Anvers-Bassin Station, at Antwerp, where it arrived May 30th, 1901. *The Belgian State Railway was operated by the Government of the Kingdom of Belgium, and the same officials of the Government who operated the railroad, were also customs officers of the Government acting as such with respect to the freight which was transported by the said railroad, pursuant and subject to the provisions of the Treaty aforesaid.* Upon the arrival of the car at Anvers-Bassin Station at Antwerp, as aforesaid, the station authorities notified Mr. Debenham of its arrival, and delivered to him

the way-bill accompanying the shipment. According to the provisions of the Treaty aforesaid, and of the Laws of the Kingdom of Belgium, Mr. Debenham then had the option of directing the railroad customs officials to take the goods to the Belgian Governmental Customs Warehouse, called the Entrepot Royal, there to remain until such time as he should direct them to be taken to the ship which was to receive them, or of directing said officials to take the car containing the goods to the wharf at which the ship was to receive them, there to remain until such time as he should direct the goods to be placed on board such ship. *In either case, the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive official custody of the Governmental Customs authorities until actually loaded on board the ship.*

As the ship on which the goods aforesaid were to be embarked for transportation out of the Kingdom of Belgium was not at the time of the arrival of said goods at Antwerp ready to receive the shipment, Mr. Debenham directed the railroad-customs-officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the Entrepot Royal, there to be held in the custody of the Belgian Customs authorities until he notified the Customs authorities that the vessel which was to receive the shipment was ready to receive and embark the shipment for export from Belgium, whereupon it would have been the duty of the Belgian Customs authorities to transport the shipment from the Entrepot Royal, said Governmental customs warehouse, to the wharf and there deliver it physically to the ship which was to receive it and to make certain that the shipment was actually embarked on the vessel and carried out

of the Kingdom of Belgium. *Under the provisions of the International Treaty aforesaid, and of the laws of the Kingdom of Belgium, a shipment of merchandise like the one aforesaid, passing through Belgian territory in bond in transit merely, was required to remain uninterruptedly in the exclusive, official custody, possession and control of the Customs authorities of the Kingdom of Belgium* (subject to the direction of persons standing in a relationship to such shipments such as Debenham occupied to the shipment in controversy, as to when and where such shipments should be delivered for deportation, as aforesaid), *until the shipment was actually, physically delivered by such Customs authorities, at the instance of the consignee of the shipment, on board the vessel which was to transport it beyond the Kingdom,* unless the consignee of such shipment paid to the Belgian Government the charge and duties due on the shipment, and accepted actual physical delivery and possession thereof.

In pursuance of the directions of Mr. Debenham aforesaid, the car which contained the goods involved in the controversy in this action, shortly after its arrival at Antwerp, was taken by the Customs authorities from the Anvers-Bassin Station to the Entrepot Roval, where, on June 1, 1901, the goods were unloaded from the car and stored in the warehouse, under the exclusive custody and control of the Belgian Customs authorities. Upon receipt of the goods in the warehouse, the Customs authorities delivered to Debenham a document called 'Acquit de Transit', which Debenham was to keep until the moment when the goods were to be removed from the warehouse to the steamer, and to deliver up to the Customs authorities whenever, on his directions, the goods were to be embarked on board of the deporting vessel.

Whenever the goods were to be thus removed, the law required that Debenham should present this document called 'Acquit de Transit' to the Customs authorities, whereupon the latter authorities would issue a 'remise au depart' (release for departure) and send the goods to the deporting steamer, officers of the Customs remaining in custody thereof until the goods were actually and eventually loaded on board, and thereby passed out of the Kingdom. The warehouse charges were paid by Debenham. The transportation charges from the warehouse to the steamer would have been payable by Debenham, and would have been by him chargeable and collectible from Oswald Roth, the shipper aforesaid."

III.

PLAINTIFF IN ERROR SHOULD NOT BE HELD LIABLE AS AN INSURER FOR THE LOSS OF THE GOODS INVOLVED IN THIS CASE, BECAUSE THEY WERE IN CUSTODIA LEGIS, AND NOT IN THE POSSESSION OR UNDER THE CONTROL OF THE PLAINTIFF IN ERROR AT THE TIME OF THEIR DESTRUCTION.

It thus appears from the statement of facts, we think, beyond question or doubt that all parties concerned contemplated and contracted for the transportation of a consignment of merchandise *in bond* to and through the Kingdom of Belgium, and that "shipments of such merchandise could, pursuant and subject to the provisions of said treaty be transported into and beyond the territory" (of the nations through which it passed) only

> "provided that each of the said shipments of merchandise were contained in receptacles that remained sealed, unbroken, and in the *uninterrupted, exclusive and official custody of the Government Customs authorities* of the nations whose territory it was traversing *throughout its transportation through such territory, and during its continuance in such territory, and until its final deportation therefrom*" (Statement of Facts, pp. 6 and 7).

It is true that the agent of plaintiff in error at Antwerp, upon the arrival of the consignment there, had the choice of directing the Customs authorities to keep the shipment in its custody either:

1. In the Belgian Governmental Customs Warehouse called the Entrepot Royal; or

2. In Governmental cars on the wharf at which the ship was to receive them, but

> *"In either case the goods were required to remain and would have remained during their entire transit, and their deposit and detention, whether in the Entrepot Royal or on the wharf, in the uninterrupted, exclusive, official custody* of the Governmental Customs authorities until actually loaded on board the ship" (Statement of Facts, pp. 9 and 10).

In other words:

The goods arrived in Government Custody at Antwerp; the ship was not ready to receive the goods, and, therefore, it became the duty of Mr. Debenham to indicate whether the goods were to be detained (in the same Government custody) either in Government cars on the wharf or in the

Government warehouse. He preferred the Government warehouse. The goods were taken there and he was given an "Acquit de Transit"—a receipt for goods in transit. Debenham did not issue any bill of lading or paper of any kind covering the goods, because it was legally and compulsorily required of all concerned to leave the goods

> "uninterruptedly in the *'exclusive official custody, possession and control of the Kingdom of Belgium'*, until the shipment was actually physically delivered (at the instance of the consignee of the shipment) by such Customs authorities on board the vessel which was to transport it beyond the Kingdom of Belgium".

The Agreed Statement of Facts, with studious persistence, repeats again and again that shipments of goods (like those here involved) under the provisions of the Treaty, law and regulations referred to could be transported *"in bond"* only, provided that each of said shipments of merchandise were contained in receptacles

> "that remained sealed, unbroken and in *the uninterrupted exclusive and official custody, possession and control of the Governmental Customs authorities of the nation whose territory it was traversing, throughout its transportation through such territory, and during its continuance in such territory and until its final deportation therefrom"* (Statement of Facts, pp. 7 and 12).
>
> "It was the duty of Mr. Debenham to receive and forward such shipments at Antwerp *only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond*

> *for export pursuant and subject to the terms of the International Treaty hereinafter referred to might be received by any one at Antwerp to be thence forwarded under and pursuant and subject to the provisions of said Treaty''* (Statement of Facts, pp. 2 and 3).

The parties fully contemplating the Treaty expressly made arrangements for carriage pursuant and subject to its provisions (Statement of Facts, pp. 3, 4, 6, 7).

The case at bar is a novel one to which the general rules heretofore applied to control the liability of carriers in ordinary cases are not applicable; therefore the court should determine the controversy independently of the old inapplicable rules.

It has been the boast of jurists that our law is progressive, that it is adaptable to new developments in the affairs of men never foreseen in ancient times; that it can and should be applied by the courts so as to do justice to the requirements of changed conditions, notwithstanding ancient and misleading precedents which do not comprehend modern controversies.

It needs no references to show that ''arrangements for transportation'' in ''bond for export'', such as controlled the shipment under consideration were not known in early times when the elementary rules of our common law controlling carriers were evolved. The precedents referred to by plaintiff therefore could not have contemplated

such a case as the one at bar. We feel safe therefore in contending that this case is unprecedented, and that it is for the court to determine the rights of the parties, and to adjudge the controversy involved according to justice, as it may appear from the inherent merits of this new case.

As new exigencies arise, the courts should apply the law to do them justice. Declaring this principle our U. S. Supreme Court (in 1873) said:

> "And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern for the occasion for it could not sooner have arisen."
>
> Sawyer v. Hoag, 84 U. S. (17 Wallace), 620.

The shipment of goods under consideration was placed by the shippers *in bond* for transportation by various instrumentalities from Switzerland, *and was to continue in bond* until it was finally embarked on board ship for departure from Belgium. It was in receptacles which remained sealed, unbroken and in the *uninterrupted exclusive and official possession and control of the Governmental Customs authorities* throughout and at every period of time specified in the statement of facts (Statement of Facts, pp. 7 and 12). How then can it be claimed that the goods were in the possession of any one other than the Governmental authori-

ties, and particularly how can it be claimed that the shipment was in the possession or custody or control of defendant? The legal effect of placing the shipment *in bond,* i. e., in the exclusive custody, possession and control of the revenue officers of the Government was to place it in the custody of the law.

> "Where the goods are taken out of the carrier's possession under valid legal process, such as attachment, or execution, and the carrier is obliged to and does deliver them to the lawful authorities of the place where the goods are in *transitu,* or awaiting delivery, or the carrier fails to transport or deliver them because of the lawful order of a court having jurisdiction of the subject matter, the carrier is not liable for non-delivery, the process or order of the court being within the term *vis major.*"
>
> Moore on Carriers, p. 229, and cases cited.

The circumstances of a shipment similarly placed have been fully described by our federal court of last resort, which said:

> "The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the

> goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit."
>
> Hartranft v. Oliver, 125 U. S. 525, 528.

The principle declared in this case, clearly shows that it could have made no difference if the shipment had been kept on the wharf in bonded cars, because in that case too they would have been in the same position as if technically in a public store or bonded warehouse.

The shipment was rightfully and forcibly detained and withheld by the Government from all other persons until the Government delivered it out of such exclusive custody, possession and control, according to the provisions of law.

It is true that defendant was in a position to induce the Governmental authorities to deliver the shipment out of their custody, possession and

control in due time, but it is also true that in this case the Governmental authorities in fact at no time permitted the shipment to pass out of their custody, possession, or control, and that the shipment was actually in bond and in every respect in its custody, possession and control at the time when it was destroyed by fire. None of the cases cited on the part of defendant in error relate to such a state of affairs as is presented by a shipment of goods transported *in bond,* and they are therefore not illustrative of the case at bar because there is no analogy in logic or principle between the cases which they comprehend and this case.

The facts of this case, we contend, refute the claim of defendant in error that the shipment was *delivered to or accepted by defendant in error,* unconditionally, or otherwise, as a carrier for any purpose. The facts also show that because the shipment was shipped *in bond* to America, it could not be *delivered* to any one except the Customs authorities, unless and until they were actually and physically placed aboard the departing steamer, and that therefore defendant never became an insurer of the goods.

A consideration of all the cases holding a carrier liable as an insurer shows that each gives the same reason for its conclusion as in Lane v. Cotton, 12 Mod. 472 (482), where Lord Holt said:

> "for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great

equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such an opportunity as they have, by the trust reposed in them, to cheat all people, they would be apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconvenience would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril".

And, in summing up, Lord Holt states that:

"the same reason holds to charge them in this case as to charge carriers, inn-keepers and the like, videlicet, the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would be under to imbezil goods *intrusted to them*, without possibility of proving a particular neglect".

In Coggs v. Bernard, 2 Ld. Raym. 909 (918), the same reason is given, the court stating that:

"The law charges this person, thus *intrusted to carry goods* against all events but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic

> establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would be impossible to be discovered. And this is the reason the law is founded upon in that point."

In Forward v. Pittard, 1 T. R. 27 (33), Lord Mansfield, delivering the unanimous opinion of the court, gives the same reason as his only one for the doctrine. He said:

> "If an armed force come to rob the carrier of the goods he is liable, and a reason is given in the books, which is a bad one, viz.: that he ought to have a sufficient force to repel it; but that would be impossible in such cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil."

Throughout the later cases the restatement of the old basis for the doctrine continues, and it seems the only reason that can be given for it is the policy of the ancient law.

In the case of Nugent v. Smith, L. R. 1 C. P. 19, Brett, J., in stating the responsibilities of a common carrier said:

> "And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common

carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason; * * * the policy is applied to the trade of common carriers, because *when the common law adopted that policy* the business of common carriers in England was exercised in a particular manner and subject to particular conditions, which called for the adoption of that policy."

In Riley v. Horne, 5 Bing. 217, Best, C. J., said:

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property the law has added to * * * a carrier * * * the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the King's enemies."

It is clear, therefore, that this burden is placed on the common carrier, only if and because he has the exclusive custody of the goods. The goods are so entirely under his control that there is no disinterested party so situated that he can be

called upon to show the negligence of the carrier. Since that is true so should the converse be, i. e., when the carrier's custody is not exclusive, the insurance liability should not be thrust upon him.

Insurance liability is so extreme that the courts rigidly confine it to the exact situation for which the law was originally laid down. The business must be carriage, and the courts insist upon two requirements to meet their conception of carriage; first, the carrier shall have possession; second, that the carrier shall transport. Thus bridge proprietors and ferrymen are not insurers as carriers because they do not take possession.

> Kentucky Bridge Co. v. Louisville Ry., 37 Fed. 567;
>
> Dudley v. Camden Ferry Co., 42 N. J. L. 25.

The reasons for the rule holding a carrier liable as an insurer being the reasons above stated by Lord Holt in the case of Lane v. Cotton (approved in the other cases referred to), it follows that the rule is not applicable in cases where these reasons are absent.

It is a familiar principle of law (which we invoke) that when the reason of a rule ceases, the rule itself ceases:

> "When the reason of the rule ceases, so should the rule itself."
>
> C. C., 3510;
>
> Katz v. Walkinshaw, 141 Cal. 116, 123.

"It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails."

People v. Appraisers, 33 N. Y. 461;

Katz v. Walkinshaw, 141 Cal. 122.

"It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim 'Cessante ratione, cessat ipse lex'. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances."

Beardsley v. Hartford, 50 Conn. 541, 542; 47 Am. Rep. 677.

It is within the knowledge of the court that Treaties between nations for the transportation of shipments of freight through their territory, *in bond in transit for export* are devices of modern origin, and that the relations of carriers under their provisions must necessarily be different from those of olden times in many respects. Cases like the one at bar as well as others of various aspects and complications will arise in course of time. It is important, therefore, that the status of carriers with regard to shipments of freight carried pursuant to such treaties in bond should be deter-

mined. At the very threshhold of all inquiry on this point stands the question whether carriers are to be held as constructive custodians of such shipments, even if the shipments never are within their control but are mandatorily and unquestionably in the exclusive possession, custody and control of the Government authorities. Plaintiff in error being a carrier constantly engaged in the handling of shipments *in bond* is very greatly interested in a determination of the above inquiry, which has not within our knowledge heretofore come up for judicial determination.

IV.

UPON THE WHOLE CASE THE JUDGMENT OF THE COURT SHOULD HAVE BEEN GIVEN IN FAVOR OF THE PLAINTIFF IN ERROR.

We submit that the rules of logic and of sound legal principles—the dictates of justice—should discharge plaintiff in error from liability in a case like this and that judgment should have been given in favor of the plaintiff in error.

V.

THE TRUE MEASURE OF DAMAGES IN THIS CASE IS THE VALUE OF THE DESTROYED GOODS AT THE PLACE OF DESTRUCTION.

We also contend that the District Court erred because it failed to accept the value of the goods

contained in the shipment at *the place of destruction.*

In the case of

Lakeman et al. v. Grinnell et al., 5 Bosw. 625,

the court went very fully into the reasons why this rule should prevail where the goods are lost at the port of departure. In that case the goods had been bought in New Haven, Connecticut, to be shipped to Liverpool, England. They were put on board ship at New York, and were there destroyed by fire before the departure of the vessel. The value of the goods at that time in New York was $4685.27, and in Liverpool $8054.18. Said the court:

> "There is no question on the authorities but that the common carrier who has received goods for transportation and has actually performed the journey or voyage is, in case of non-delivery of the goods, unless the failure to deliver is excused by the act of God, or perils of the sea, liable, as a general rule, for the value or price which they would have brought at the port or place of destination, if they had been delivered according to contract.
>
> The defendant's counsel, however, insists that it would be unreasonable to adopt the valuation at the place of destination, when the goods have never left the place at which they were received by the carrier, but have been destroyed at such place by some cause other than the carrier's own negligence, and insists that in such a case the value of the goods, at the place where they were received by the carrier, is the true rule both in principle and authority."

The court then discusses the case of Wheelright v. Beers, 2 Hall's Sup. Ct. R. 391, in which case the

goods were damaged on a voyage from New York to Omoa, a part of which were sold at an intermediate point, viz, Norfolk, and the rest of which were brought back to New York and there disposed of, and where the court held that the rule for the damages in that case was the loss on the sale of the goods at those two points, and not the price of the goods at the point of destination.

In this regard the court then states:

> "The loss on the sale of the goods at Norfolk, and New York was considered as the true rule as to damages, upon the ground that there was no fault or fraud on the part of the defendant from which the loss arose, and that the case only showed a breach of the implied warranty of seaworthiness."

The court also refers to the case of Dusar v. Murgatoid, 1 Wash. C. C. 13, in which it was held that the measure of damages in a case where the goods were damaged about half their value at the port of departure, was the difference between the prime cost and the charges, and the sales at the place of shipment.

The court then proceeds to examine the reasons which should determine the measure of damages in the case, and said:

> "The true test, I apprehend is what will furnish the plaintiff full indemnity. If the value of the articles according to the invoice price, will fully compensate for the loss, that price should govern. If the value in the place where to be delivered is necessary to furnish complete remuneration, that should be adopted; and

hence the question whether the goods are lost in the place where they are received by the carrier, or in the place where they were by the contract to be delivered, may become one of the last importance. I say *may* become, because I do not say that it is necessarily decisive in all cases; for I can well imagine a case in which the goods are lost in the port of departure, in which, from an impossibility of procuring other articles of the same kind, or from other causes, the value at the port of destination would furnish the only adequate indemnity to the plaintiff. In such a case it ought, except under special circumstances to be adopted. But if the goods could be immediately replaced at the same price, and sent forward by another vessel, it would be unreasonable to give the plaintiff the profits he might have made if the goods had not perished, and the first shipment had been successful.

This furnishes a safe and righteous rule, and divests the question of damages of the penal character which it would have if the good conduct of the carrier were the sole test. This is the reason why, when the vessel has arrived at the port of destination, the value of the missing goods at that place is adopted. No other rule would compensate. So, if the vessel should perform but a portion of her voyage, and the goods are sold or lost by act of the carrier at an intermediate port, as in the case of Wheelwright v. Beers, in 2 Hall's Report, the value at the port of destination might well be given if the plaintiff was unable to replace the goods at the intermediate port and forward them on, as, on the other hand the invoice price which was adopted in that case would be proper if, under the peculiar circumstances of the case that would furnish complete indemnity.

It follows that whether the carrier has been guilty of negligence or fraud is not the only

test, nor whether the voyage has been begun or not; but whether the market price at home, or the price at the port of destination, furnishes the true and perfect indemnity.

* * * In the case now before us the vessel was destroyed by fire, while lying at the wharf, the day after plaintiffs' goods were put on board, and before the day on which she was to have sailed. The question then is, how can the plaintiffs be perfectly indemnified for this loss. Unless, in the absence of proof on the subject, we are to assume that the plaintiff could not, in the port of New York, or by sending to Connecticut, where the goods were purchased, have procured other goods on that day, or within a reasonable time afterwards, of the same quality and at the same price, and further assume that no other means of transportation of the goods to Liverpool could have been procured in this port within a reasonable time of the day on which the Henry Clay would, but for her destruction, have sailed, neither of which presumptions can, I think, be reasonably entertained, we must hold that, so far as the valuation of the goods is concerned, the value in this port, at the market price, was the true measure of damages as giving a full indemnity. * * * And I am not prepared to say that in a case like the present, in which, without any imputation of negligence on the part of the defendants, their vessel was accidentally destroyed by fire within a few hours after the goods were received on board, we should not consider it inequitable and unjust to impose on them a higher rate of damage than the invoice price or home valuation of the goods, if that were not sufficient to give a perfect indemnity. But we are relieved from all doubt on the latter point by the consideration that the goods were lost in the port of New York, between which and Liverpool communication is almost daily,

> and by the fact that there is nothing in the evidence to raise a doubt that the goods might have been immediately replaced at the same price at which they had been purchased."

In the case of

Joshua Barker, 13 Fed. Cases, No. 7547,

the goods were damaged and sold by the carrier before they reached their destination, without notice to the shippers, and the court held that the sale of the goods was tortuous and wrongful, and for that reason the measure of damages was fixed as the price of the goods at the place of destination, the court saying:

> "The libellants were accordingly entitled to charge the claimants the value of the flour laden on the vessel, and not delivered at the port of destination as tortuously disposed of by them."

In Ringold v. Haven, 1 Cal. 108, 119, the court disposed of the point under discussion as follows:

> "Upon this point (the measure of damages in case of this kind) the authorities do not coincide—some jurists of eminent ability holding the price at the place of shipment to be the limit, or, as the case may be, the extent of damages which the plaintiff is entitled to recover,—but we are of opinion that the weight of authority, as well as the reason of the thing is in favor of making the value of the goods at the port of delivery the rule for determining the amount of damages."

The ruling in this case was shortly thereafter reaffirmed in

Hart v. Spalding, 1 Cal. 214.

The case of Ringold v. Haven, supra, is cited with approval in

The Arctic Bird, 109 Fed. 167, 175,

Judge De Haven rendering the opinion, and stating:

> "The freight having been prepaid, the measure of damage is the market value of the goods at the place of destination, at the date when they should have been delivered, with interest from that date. (Citing cases.) The owner is entitled to have the equivalent of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, *less the charges for transportation and delivery.*

Same:

> Northern Commercial Co. v. Lindbloom, 162 Fed. Rep. 250, 255.
>
> "The measure of damages in this class of cases, where there has been a failure to deliver, is the current value of the goods at the port of destination, with interest on the same. Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for non-delivery. From the date of such non-delivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested in the goods, and should have redress by being allowed legal interest thereon. The tendency of the modern authorities is to allow interest in all cases, and surely this is one in which it ought to be allowed, if in any."
>
> The Nith, 36 Fed. 86, 96.

We think that upon these authorities defendant in error should have been awarded (if anything)

either the price of the goods at the place of their destruction or their price at the place of their destination *less the cost of transportation to that point.* Of course this court can make provision for ascertaining this cost of transportation.

We urge, however, that, on the merits, the judgment of the court below is erroneous, that the same should be reversed, and that plaintiff in error should have judgment in its favor.

Dated, San Francisco,
May 15, 1915.

Respectfully submitted,

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